

2016 Appeals for Trial Prosecutors

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APAAC Training Center
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Lower Court Appeals

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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Lower Court Appeals Checklist

If the State is the Appellant:

- Do you have an appealable order or is this a special action?
- File the Notice of Appeal and Designation of Record within 14 calendar days of the ruling appealed from
- Order the relevant CDs from the trial court
- If the CD is 90 minutes or longer (Maricopa County Local Rule 9.4(b)) get it transcribed (In Gila and Graham Counties, the rule is one hour)
- Order a copy of the court file including any exhibits
- Order the trial prosecutor's file
- File the Opening Memorandum within 60 calendar days of the deadline to file the Notice of Appeal
- Ask for Oral Argument in the caption of the Opening Memorandum if desired

If the State is the Appellee:

- Was the Notice of Appeal timely filed or should you move to dismiss it in a procedural motion?
- Is the order sought to be appealed from appealable? If not, move to dismiss in a procedural motion.
- File a Designation of Record, if necessary, within 14 calendar days of the filing of the Appellant's Designation of Record
- Order the relevant CDs from the trial court
- Order a copy of the trial court file
- Order the trial prosecutor's file
- File the Answering Memorandum within 30 calendar days of filing of Appellant's Opening Memorandum.
- Ask for oral argument in the caption of the Answering Memorandum if desired

LOWER COURT APPEALS

What is a lower court appeal?

The Superior Court is the appellate court in these appeals and the trial court is the city or justice court.

What is an appealable order or judgment?

13-4032 Appeal by the State:

- (1) order dismissing indictment, information, complaint or a count thereof;
- (2) order granting a new trial;
- (3) ruling on a question of law adverse to the State when a defendant appeals (cross-appeal);
- (4) an order made after judgment affecting the substantial rights of the State or a victim – note if the appeal is on behalf of the victim it must be made at the victim's request. (examples restitution order or trial judge's denial of State's motion to withdraw from plea agreement);
- (5) an illegal sentence;
- (6) an order granting a motion to suppress – note the cases limit appealable suppression orders to those that suppress on a constitutional basis, other grounds of evidence preclusion must be challenged by special action; and
- (7) a judgment of acquittal of one or more offenses that is entered after a verdict of guilty.

13-4033 Appeal by a Defendant:

- (A)(1) a final judgment of conviction or a verdict of guilty except insane;
 - (2) an order denying a motion for new trial
 - (3) an order made after judgment affecting the substantial rights of the party;
 - (4) a sentence on the grounds it is illegal or excessive.
- (B) In noncapital cases a defendant may not appeal from a judgment or sentence entered pursuant to a plea agreement or an admission to a probation violation.

22-371(A) The defendant in a criminal action may appeal to the Superior Court from the final judgment of a justice or municipal court.

22-371(D) A defendant may not appeal from a judgment or sentence entered pursuant to a plea agreement or from an admission to a probation violation.

What rules govern lower court appeals?

Rule 30.1(b), Arizona Rules of Criminal Procedure states that the Superior Court Rules of Appellate Procedure-Criminal govern.

Rule 1(a) Superior Court Rules of Appellate Procedure-Criminal states that these rules govern criminal appeals in an action from the justice or municipal courts. When civil and criminal traffic cases are consolidated, the rules governing criminal appeals apply.

Superior Court local rules also apply to the extent they dictate format or have specific rules for lower court appeals.

What are the deadlines for filing a lower court appeal?

The notice of appeal must be filed with the trial court (that means the municipal or justice court) within **14 calendar days** of the date of the order, judgment, sentence or ruling appealed from except a notice of delayed appeal shall be filed within 14 calendar days after entry of an order granting a delayed appeal. Rule 4(a), Superior Court Rules of Appellate Procedure-Criminal.

It must be received by the court within the allotted time. Rule 3(a). There is no extra time afforded for mailing. Rule 1(e), and filing a motion for reconsideration does not enlarge the time. Only a defendant can file a delayed appeal upon making the appropriate showing under Rule 32.1(f) of the Arizona Rules of Criminal Procedure.

Failure to timely file a notice of appeal is jurisdictional, requiring dismissal of the appeal.

The notice of appeal must identify the order, judgment, sentence, or ruling appealed from. Rule 3(b), Superior Court Rules of Appellate Procedure-Criminal.

The appellant must file an original and copy of the designation of record within 14 calendar days of the date of the order, judgment, sentence or ruling appealed from. Rule 7(d), Superior Court Rules of Appellate Procedure-Criminal. The record on appeal will include the notice of appeal, the charging document, the sentence, the order that is the subject of the appeal, motions, exhibits, and the CD or transcript. Rule 7(c). The opposing party (appellee) files its designation of record within 14 calendar days of the filing of the appellant's designation. Rule 7(d). Whether you

are the appellant or appellee, you must make sure that you designate anything not included that is needed to decide the issues in your appeal (oral argument on suppression motion, closing arguments, jury instructions etc.)

What are the Defendant's Conditions of Release on Appeal?

Conditions of release and the posting of bond pending appeal are governed by Rule 7.2, Arizona Rules of Criminal Procedure. The posting of bond is not a condition of the right to file an appeal. Rule 6(a), Superior Court Rules of Appellate Procedure-Criminal.

The execution of sentence is stayed pending appeal when a defendant posts a bond pursuant to Rule 7.2 or when an appeal is taken on the defendant's own recognizance. But an order requiring the payment of restitution shall not be stayed and restitution is paid to the clerk of the court during the pendency of the appeal.

In appeals from limited jurisdiction courts, a defendant convicted and sentenced to jail shall remain under the same release conditions previously imposed pending appeal. The defendant's release will be revoked if he fails to diligently prosecute the appeal. Rule 7.2(c)(2)(A), Arizona Rules of Criminal Procedure. The State or the court on its own motion may move to amend the conditions of release on appeal when there appears a substantial risk to another person or the community or the defendant is unlikely to return to court. Rule 7.2(c)(2)(B).

How can trial prosecutors help build a good record for review?

From an appellate standpoint, you want the best trial court record possible as with any appeal. The problem is these trial courts are hit and miss. Often there are no minute entries for dates that the docket indicates a hearing took place. This hearing may be relevant for the appeal and you may have to order the FTR. Please put dates and relevant rulings in your case log so that when the person doing the appeal orders the trial file, he or she will know what hearings to order. Otherwise defense attorneys may mischaracterize or flat out make up what took place (Rule 8 special action example)

Please respond to motions and keep a copy of everything in your case file since the court file may be lacking.

What if the record is insufficient for review?

Suppose the CD of the suppression hearing you are appealing from does not play or a trial CD was accidentally destroyed by the justice court? Although the rules are somewhat contradictory, the preference is for a do over in the trial court rather than a de novo proceeding in the Superior Court although both are discussed in the rules.

Rule 2(d), Superior Court Rules of Appellate Procedure-Criminal states that if the Superior Court determines that the record is insufficient to determine the issues, a trial de novo shall be held in Superior Court.

If it appears to the trial court (that is the justice or municipal court) that the record is insufficient, the court may on its own motion or the motion of any party reset the case for trial. Appeal rights run from the entry of judgment or order following the new trial. The preference is for a new trial at the trial court level. Cases summarily transferred to the Superior Court for a trial de novo due to an insufficient record may be remanded for a new trial in the trial court. Rule 7(g), Superior Court Rules of Appellate Procedure-Criminal.

Cases summarily transferred to the Superior Court for a trial de novo or determined by the Superior Court to have an insufficient record may be remanded to the original trial court for a new trial. Unlike a trial de novo held in Superior Court, the parties in a case remanded for a new trial in the original trial court shall have the right of appeal. Rule 9.10(e), Maricopa County Superior Court Local Rules.

What are procedural motions?

Procedural motions are motions on issues that determine whether the appeal should go forward. These could be motions to dismiss for an untimely filed Notice of Appeal or a motion to dismiss an appeal that was not filed from an appealable order. Procedural motions are filed in the trial court but ruled on by the Superior Court. Rule 8(c)(1), Superior Court Rules of Appellate Procedure-Criminal. Such motions should be captioned: "Procedural Motion-Refer to Superior Court" and the response: "Procedural Motion Response-Refer to Superior Court." Rule 8(c)(3). While such motions are pending, other deadlines are suspended. If the appeal is allowed to proceed, further papers are filed in the Superior Court. Rule 8(c)(4).

What are the requirements for the Appellate Memoranda?

The Appellant's Opening Memorandum must be filed and served on the same day (note the court serves those of indigent defendants) Rules 8(a)(1), 14, Superior Court Rules of Appellate Procedure-Criminal.

The Appellant's Opening Memorandum must be filed within 60 calendar days from the deadline to file the notice of appeal. The Appellee's Answering Memorandum is due within 30 calendar days of the filing date of the Opening Memorandum. No reply is to be filed, Rule 8(a)(2), Superior Court Rules of Appellate Procedure-Criminal.

Motions for additional time to file memoranda must be made to the trial court. Rule 8(b), Superior Court Rules of Appellate Procedure-Criminal.

If no Appellee's Answering Memorandum is filed, the appeal shall be submitted on the record. It shall not constitute a confession of error. *Id. But see* Gila County Local Rule 31(C) which states that if the appellee fails to file a timely memorandum, the court may deem the appellee to have confessed error.

The memoranda shall include:

- A short statement of facts with references to the record
- An argument with legal issues presented and citing authority
- A conclusion with the precise remedy sought on appeal

Rule 8(a)(3), Superior Court Rules of Appellate Procedure-Criminal

For the purposes of "references to the record" in Rule 8(a)(3) when the record of the proceeding appealed from is an audio or video recording, the rule requires the party to the appeal to cite to the specific portion of the recording at which the evidence is found. *Jordan v. McClennen*, 232 Ariz. 572, 573, ¶ 1, 307 P.3d 999, 1000 (App. 2013).

The memoranda must be on single-sided 8.5 x 11 inch white paper, and double-spaced except for quotes. The page limit is 15 pages exclusive of any appendices. Rule 8(a)(4), Superior Court Rules of Appellate Procedure-Criminal. A motion to exceed the page limit can be made under Rule 8(a)(5) which authorizes the court to waive or modify a rule to insure a fair and just determination of the appeal.

In Maricopa County the font size can be no smaller than 12 point and that applies to the text, quotes, and footnotes. Rule 2.16, Maricopa County Superior Court Local Rules.

In addition to the citation of memorandum decisions as permitted by Rule 111(c) of the Rules of the Arizona Supreme Court, the Maricopa County Local Rules allow the citation of non-published decisions in lower court appeals but only if those decisions are posted on the Superior Court's website. They "may be deemed persuasive, but without binding precedential effect." The place to find these decisions is:

<http://www.superiorcourt.maricopa.gov/superiorcourt/lowercourtandadminappeals/index.asp>

A party desiring oral argument needs to request it in the caption of the memorandum. Rule 11(a), Superior Court Rules of Appellate Procedure-Criminal. In Maricopa County, parties are afforded 15 minutes per side. Rule 9.7, Maricopa County Superior Court Local Rule.

In Maricopa County, once the memoranda have been filed in the trial court, they are transferred to the Superior Court where the case is given an LC number. Rules 9.2(d), Maricopa County Superior Court Local Rule.

What are the possible dispositions of lower court appeals?

- Reverse and remand for a new trial
- Reverse and direct a verdict of acquittal
- Affirm and remand
- Affirm and modify sentence


Rule 12(b)(1)-(4), Superior Court Rules of Appellate Procedure-Criminal.

What are the provisions for rehearing?

Within 14 calendar days after service of a decision or an order any party may file a motion for rehearing. The response is due within 14 calendar days of the motion. No oral argument will be heard. Rule 13(a), Superior Court Rules of Appellate Procedure-Criminal.

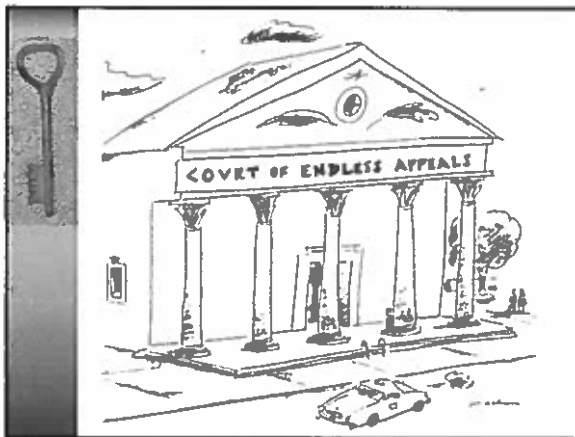
What are the options for further review?


22-375(A) limits appeals from Superior Court in actions appealed from an inferior court to those involving the validity of a tax, impost, assessment, toll, municipal fine, or statute. This includes appeals from convictions in the superior court that are the result of a trial de novo. In other cases, special action relief may be appropriate.



Lower Court Appeals

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What is a lower court appeal?

“Trial court” municipal or justice court

“Superior court” appellate court



What is an appealable order?

- ♦ 13-4032 Appeal by the State
- ♦ 13-4033 Appeal by the defendant



What rules govern lower court appeals?

- ❖ Superior Court Rules of Appellate Procedure-Criminal
- ❖ Superior Court Local Rules



Deadlines for filing a lower court appeal?

14 calendar days- jurisdictional



What are the defendant's conditions of release on appeal?

❖ Rule 7.2



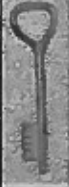
How can trial prosecutors help build a good record for review?

♦ Case log and file



What if the record is insufficient for review?

♦ Preference for new trial in municipal or justice court



What are procedural motions?

–Motions to dismiss



What are the requirements for the Appellate Memoranda?

- ❖Facts
- ❖Argument
- ❖Conclusion



Possible dispositions of lower court appeals?

- ◆Reverse and remand for a new trial
- ◆Reverse and direct a verdict of acquittal
- ◆Affirm and remand
- ◆Affirm and modify sentence



What are the provisions for rehearing?

- 14 calendar days
- No oral argument



What are the options for further review?

- ♦ Limitation in 22-375(A)



Lower Court Appeals Checklist

- ♦ State as the Appellant
- ♦ State as the Appellee
